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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1240

MRS. JOYCE ROY STOCKSTILL, et al,
Petitioner,

versus

GYPSUM TRANSPORTATION, et al,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Gypsum Transportation, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Fifth Circuit's opinion in this case. That opinion is reported at 607 F.2d 1112 (5th Cir. 1979), denial of application for rehearing, 610

F.2d 818 (5th Cir. 1980). The opinion of the United States District Court for the Eastern District of Louisiana is unreported, a copy is attached hereto as Appendix A.

QUESTION PRESENTED

Whether petitioner produced any evidence of vessel owner negligence?

STATUTORY PROVISION INVOLVED

33 U.S.C. Section 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the

vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

The statement of facts of this case by the Court of Appeals[1] was correct and is adopted by respondent.

REASONS WHY THIS WRIT SHOULD BE DENIED

The petitioner failed to produce any evidence of vessel owner negligence as was found by both lower courts. In essence, taking the trial testimony in the most favorable light to petitioner, the evidence at trial established a condition, an injury and the mere presence of the crew members on the vessel. There was no evidence to associate the crew members with the alleged hazardous condition (oil on deck). The Court of

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1 607 F.2d 1112 (5th Cir. 1979).

Appeals, in a well reasoned opinion by Judge Ainsworth, carefully considered the evidence produced at trial and found it clearly wanting.

Petitioner alleges a conflict with the decision of this Honorable Court in *Edmonds v. Compagnie General Translantique*, 61 L.Ed.2d 521, 99 S.Ct. 2753 (1979). *Edmonds* did not deal with the standard of care issue, rather *Edmonds* dealt with the question of reducing the liability of a *negligent* shipowner by the negligence of the stevedore employer (the negligence of the longshoreman did, of course, reduce his recovery). In *Edmonds* there was evidence of negligence of the shipowner, in fact the shipowner was found to be 20% negligent by the lower courts. There is no conflict with *Edmonds* because in this case the shipowner was not negligent.

An allegation is made that the decision herein conflicts with the decision by the Fifth Circuit Court of Appeals in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977). Again the fact that the respondent was not negligent negates any allegation of a conflict. Further, both lower courts carefully considered the standard of care enunciated in *Gay* and found no violation of that standard.

Respondent suggests that petitioner's allegation of conflict between the decision herein and decisions from other circuits fails to avail petitioner of right to relief from this Honorable Court. The Second Circuit in *Cox*

v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir.), *cert. denied*, 439 U.S. 893 (1978) distinguished the prior decision of *Lubrano v. Royal Netherlands Steamship Company*, 572 F.2d 364 (2d Cir. 1978) on the basis that in *Lubrano* there was evidence that the ship's officers joined in the direction to the longshoremen to continue to work in spite of the absence of dunnage, whereas in *Cox* there was no evidence of vessel participation in the decision of the stevedore to work without securing the hatch beams. 577 F.2d at 802. As noted above, this Honorable Court denied certiorari in the *Cox* decision.

In *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir.), *cert. denied*, 439 U.S. 929 (1978), there was a factual finding that the vessel's crew had placed cluster lights on a greasy deck thereby creating a dangerous condition that was the proximate cause of the plaintiff's injuries and/or that in so placing the lights the vessel's crew had actual knowledge of the greasy condition. 579 F.2d at 685. In this case the Fifth Circuit found no evidence upon which to base a conclusion that the respondent herein knew or should have known of the oily condition. 607 F.2d at 1117.

Lopez v. A/S D/S Svendborg, 581 F.2d 319 (2d Cir. 1978), involved a summary judgment and some evidence that the vessel's crew had direct awareness of the alleged dangerous condition.

As can clearly be seen, none of the cases cited by petitioner as being in conflict with the decision herein are

in actual conflict. The cases which held the vessel owner liable all are distinguished by factual findings of negligence which was based either upon participation by the vessel's crew in creating the hazard or evidence of actual notice of the condition. In this case there is no evidence of vessel participation in the creation of the alleged hazardous condition, nor was there any evidence of notice to the vessel of the condition. By this date, surely it is hornbook law that in a suit under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), the plaintiff must prove some vessel owner negligence prior to recovering any damages. Under any care standard notice of the hazardous condition is a necessary and indispensable element in proving a negligence case. Both courts below properly determined that this needed element of notice was missing from the evidence presented below.

CONCLUSION

Petitioner failed to produce any such evidence and it is respectfully submitted that the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this ____ day of March, 1980, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

J. FRANCOIS ALLAIN

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

LOWELL STOCKSTILL

SECTION "A"

versus No. CA 73-3060

Civil Action

GYPSUM TRANSPORTATION, LTD.

REASONS FOR DIRECTED VERDICT

This case arises under the provisions of the Longshoremen's and Harbor Workers' Act as amended in 1972 to recover for injury to plaintiff Lowell Stockstill allegedly caused by the negligence of the vessel GYPSUM QUEEN owned by defendant Gypsum Transportation, Ltd.

The Fifth Circuit has in *Gay v. Ocean Transport and Trading Ltd.*, (5th Cir., Feb. 11, 1977) set out the standards to be applied to a case of this nature, adopting the guidelines set out in the Restatement of Torts (Second) §342, §343, §343A, providing:

A possessor or land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Section 343 states,

A possessor land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger.

Section 343 A continues,

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

In the instant case, while there is evidence that there were ship's personnel on the vessel at the time of the accident, the record is absolutely devoid of any proof that any action on the part of such personnel was a cause of injury to Mr. Stockstill. On the contrary the evidence reveals that the ship's crew was not participating in the work being done by Stockstill's employer's crew nor were they in the area at the time of Mr. Stockstill's fall. Therefore, plaintiff having failed to prove any affirmative negligent act on the part of ship's personnel which caused the accident, the only basis for

recovery lies in proof of a danger or defect of the premises on which Stockstill and his crew were working.

Mr. Stockstill's testimony is that he fell from the ladder when his hand slipped from the ladder rungs and that he noted grease or some similar substance on his hand subsequent to the accident. Mr. Shady Philips, his co-worker, testified that there was grease or an oily substance on the deck leading to the ladder into the hold where the accident occurred, which substance he noticed and was able to describe in some detail in his testimony. However, it is clear that the grease or oil on the deck adjacent to the ladder leading into the hold was a condition of which plaintiff and his co-workers were aware of or should have been aware of in the exercise of reasonable care. Although plaintiff and his co-worker Philips were not experienced in work on ships, this fact does not control. Even a shoreside person knows or should know the risk involved with a substance such as grease on a floor or deck, specifically the risk of slipping or falling. In this instance not only was the danger of the grease open and obvious, but it was one which the plaintiff and his co-workers would be in a position to fully appreciate.

Having carefully considered the standard of negligence set out in the Gay case, supra, and applying the same to the facts as set out by the testimony and the evidence presented in this case, it is the opinion of the

Court that this case clearly is one in which a directed verdict is proper. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

For the foregoing reasons, the motion of defendant Gypsum Transportation, Ltd. for a directed verdict should be and the same is hereby GRANTED, dismissing the claim of plaintiff as against defendant, with prejudice, each party to bear its own costs.

New Orleans, Louisiana, this 13th day of April, 1977.

/s/ CHARLES SCHWARTZ, JR.
UNITED STATES DISTRICT
JUDGE